No. 18,724

IN THE

United States Court of Appeals
For the Ninth Circuit

F. J. GUNTHER,
Appellant,

vs.

SAN DIEGO & ARIZONA EASTERN RAILWAY COMPANY, a corporation,
Appellee.

BRIEF FOR APPELLANT

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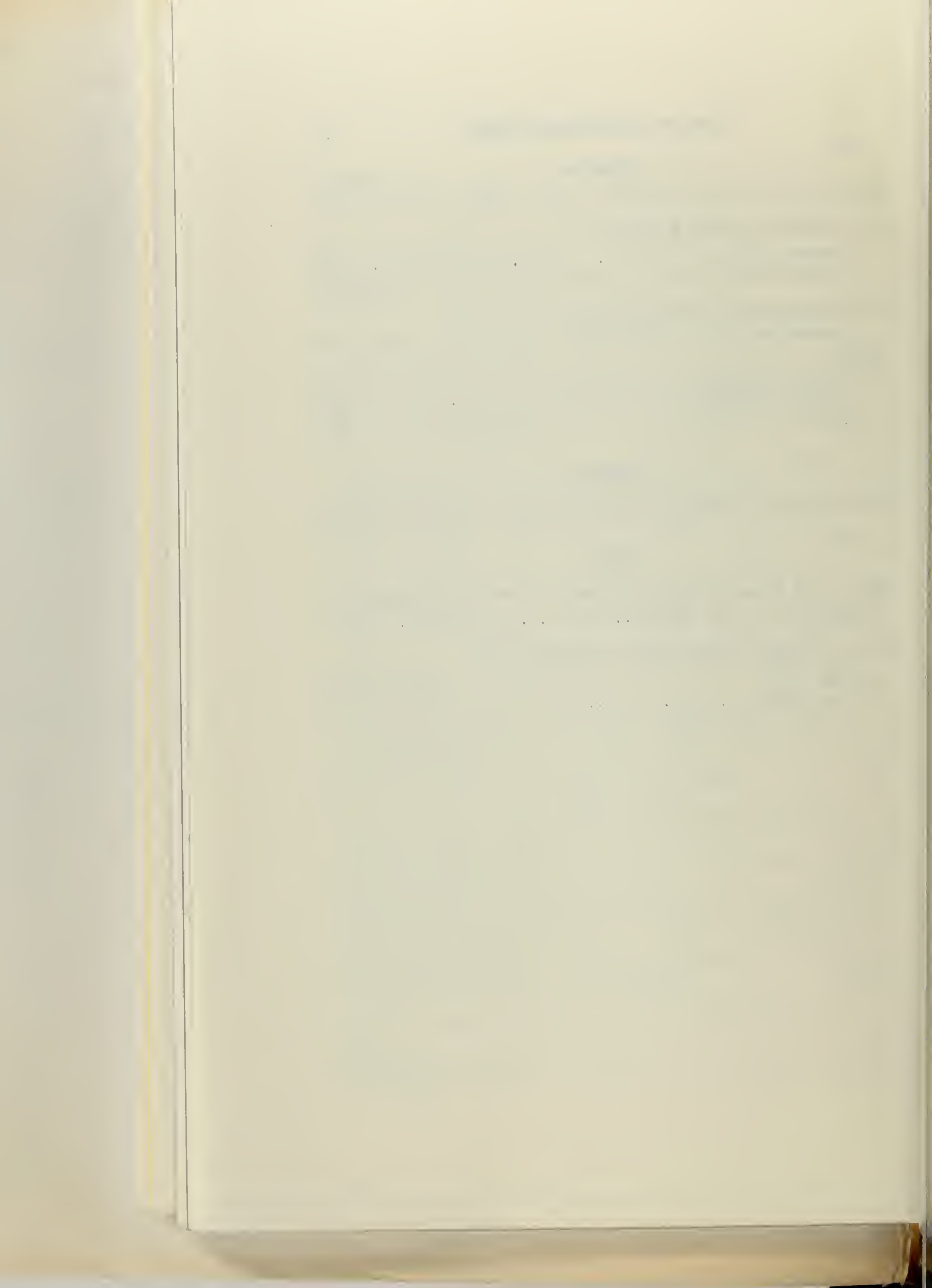

No. 18,724

IN THE

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F. J. GUNTHER,
Appellant,
vs.
SAN DIEGO & ARIZONA EASTERN RAILWAY COMPANY, a corporation,
Appellee.

BRIEF FOR APPELLANT

This is a consolidated appeal from orders granting summary judgment to appellee and denying appellant's subsequent motion for relief under Rule 60 (b) of the Federal Rules of Civil Procedure.

Following entry of the order granting summary judgment, appellant appealed to this court. The record was docketed on February 26, 1962. Thereafter, following the procedure outlined in *Creamette Co. v. Merlino* (9 Cir. 1961) 289 F. 2d 569 and *Greear v. Greear* (9 Cir. 1961) 288 F. 2d 466, appellant secured an order of the district court indicating its intention to entertain his motion under Rule 60 (b), Federal Rules of Civil Procedure and the record was remanded. Appellant's motion under Rule 60 (b) was denied by order entered on April 10, 1963. Ap-

pellant filed a timely notice of appeal from that order and the record of the proceedings on the Rule 60 (b) motion was docketed here on June 10, 1963. Thereafter, the record of the summary judgment proceeding was returned to this court and the two records consolidated for use on this appeal. The consolidated record contains the documents designated by the parties upon the appeal from the summary judgment and the subsequent appeal from the order denying relief under Rule 60 (b).

Appellant initiated this action on November 28, 1960 by filing in the district court for the Southern District of California, Southern Division, a petition (R 2-12)[1] under 45 U.S.C.A. 153 (p)[2] seeking enforcement of an award and order[3] of the First Divi-

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[1]References to the record on appeal will be by use of "R" plus page number. Where appropriate, the line referred to will be designated by number separated from page numbers by a colon mark.

[2]"If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner . . . may file in the District Court . . . a petition setting forth briefly the causes for which he claims relief, and the order of the Division of the Adjustment Board in the premises. Such suit in the District Court shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, * * *. The District Courts are empowered under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board." (45 U.S.C.A. 153 (p).)

[3]The award and order, dated October 2, 1956, and the interpretation, award and order dated October 8, 1958 were incorporated into the petition and are exhibits A and B thereto. (R 7-11.) The district court took the view "that the two awards and the two orders must be construed together as one award and one order, taking effect with the issuance of the second." (R 108:2.)

sion of the National Railroad Adjustment Board[4] which ordered appellant reinstated to active employment by appellee[5] with pay for time lost. The order of reinstatement was made on the basis of the finding of a majority of the members of a three physician panel established by the Board to the effect that on December 30, 1954, when the company disqualified appellant from active service because of alleged physical unfitness, he was, in fact, physically qualified to perform his duties as a locomotive engineer. The company's response to the petition was a motion for summary judgment, filed before answer and made on various grounds. (R 13-14.) This first motion for summary judgment was denied without prejudice to its renewal on the ground that the award and order sought to be enforced was made in excess of the Board's jurisdiction and, therefore, could not be the predicate of an enforcement proceeding.[6] (R 44.) Appellee then answered (R 56-63) and, simultaneously, moved a second time for summary judgment on said ground. (R. 66-67.) The district court found that the applicable collective bargaining agreement contained no limitation upon the carrier's right to remove and retire appellant from active service upon a finding

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[4]Hereinafter referred to as the "Board" or the "Adjustment Board".

[5]Appellee San Diego & Arizona Eastern Railway Company will be referred to herein, variously, as "SD&AE", "company" and "carrier". It is a wholly owned subsidiary of the Southern Pacific Company (R 259:28) operating between San Diego and El Centro, California. (Exhibit J, Schomp affidavit filed July 23, 1962, R 286.)

[6]The district court's opinion is found at R 45-55. It is reported at 192 F. Supp. 882.

by its physicians that he was physically disqualified (R 157-158) and concluded that the award and order of the Board was "erroneous and should be set aside".[7] (R 158-159.) It was the court's view that the Board, in establishing a three physician panel to review the decision of the company's chief surgeon, and in basing its award upon the finding of the majority of said panel, was creating and imposing upon the carrier a duty not to be found in the applicable collective bargaining agreement and, therefore, was acting in excess of its jurisdiction.[8] The court deemed that the pleadings, admissions and affidavits on file showed that there was no genuine issue as to any material fact and that the company was entitled to judgment as a matter of law.

Appellant's subsequent motion under Rule 60 (b) was predicated upon his discovery, after perfecting his appeal, of documentary evidence which indicated that the applicable collective bargaining agreement did, in fact, contain a provision for review of the decision of the company's chief surgeon by a three

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[7]The district court's findings of fact and conclusions of law are at R 155-159.

> "It is interesting to note that findings of fact and conclusions of law were prepared and signed. The theory of a summary judgment is that there are no disputed facts. We have seen findings of fact accompanying summary judgments . . . which while unnecessary, did provide a handy summary. *But all too often a set of unnecessary findings of fact is the tell-tale flag that summary judgment should not have been granted.*" (*Trowler v. Phillips* (9 Cir. 1958) 200 F. 2d 924, 926, emphasis added.)

[8]The opinion of the district court, with notes and appendix, is at R 105-154. It is reported at 198 F. Supp. 402.

physician panel, and upon evidence explaining his failure to discover same prior to the hearing on the motion for summary judgment. (R 184-185.)

On this appeal appellant will show that the order for summary judgment was erroneous because the pleadings and affidavits did not clearly establish the absence of a triable issue of fact and, also, that the order denying the motion for relief under Rule 60 (b) was erroneous because, under the circumstances, it constituted an abuse of discretion.

JURISDICTION

The court below had jurisdiction under the provisions of 45 U.S.C.A. 153 (p). This court has jurisdiction of this appeal under the provisions of 28 U.S.C.A. 1291.

STATEMENT OF THE CASE

On December 30, 1954, shortly after his seventy-first birthday, the company removed appellant from active service. (R 3, 57, 70.) Appellant had been employed by SD&AE since December 18, 1916—as a fireman until December 4, 1923 and, thereafter, as a locomotive engineer. (R 2-3, 56-57.) For many years during this long service and continuing to the date of such removal from active service, appellant was General Chairman for the Brotherhood of Locomotive

Firemen and Enginemen[9] and, of course, a member of that organization.[10] (R 99.) The designated collective bargaining agent for SD&AE's engineer employees during this period, however, was a rival organization, the Brotherhood of Locomotive Engineers.[11] Thus, the applicable collective bargaining agreement establishing the contractual rights and duties of the parties was the agreement between SD&AE and its engineer employees represented by the BLE. (R 39:28, 70:8.)

Upon attaining the age of seventy, appellant was required to submit to a physical examination each three months. (R 17:27, 70:29.) The findings upon examination on November 24, 1953 and each three months thereafter were, apparently, negative, but the findings upon examination of December 15, 1954 were, according to Mr. Schomp, the company's manager of personnel, that "Mr. Gunther's heart was in such condition that he would be likely to suffer an acute coronary episode." (R 70:28-71:9.)

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[9]Hereinafter referred to as "BLF&E".

[10]On page 83 of the "green colored booklet" (R 70:10; Exhibit A to the affidavit of K. K. Schomp filed May 16, 1961) appellant's name appears as "General Chairman, Brotherhood of Locomotive Firemen and Enginemen, S.D.&A.E.Ry" This booklet "Agreement—San Diego & Arizona Eastern Railway Company and Brotherhood of Locomotive Enginemen" indicates on its cover that it contains "Rules Effective March 1, 1935 . . . (and) . . . Revised Rates of Pay Effective October 1, 1937." On page 68 thereof appears the following: "Signed this 30th day of November, 1938."

This document, which the district court deemed to contain all of the terms of the applicable agreement as of the date of appellant's removal from active service, December 30, 1954, will be referred to herein as the "green booklet". It is found at R 19.

[11]Hereinafter referred to as "BLE".

Following said removal from active service, appellant submitted to an examination by a physician of his own choice and, upon the basis of that physician's favorable report, requested that "a three doctor board be appointed to reexamine his physical qualification for return to service." (R 7.) Initially, the Board denied his claim without prejudice. (R 7.) Appellant then obtained a supplemental report from his physician and resubmitted his claim. (R 7.) The result was an award establishing a three physician panel and stating:

> "If the decision of the majority of such board shall support the decision of carrier's chief surgeon the claim will be denied; if not, it will be sustained with pay pursuant to rule on the property from October 15, 1955, the date of the letter of Dr. Hall showing disagreement with the findings of disqualification by the company physicians." (R 8.)

Pursuant to this award, the parties agreed upon a board of three physicians and appellant was examined by the neutral member thereof whose report was favorable to appellant. According to the Adjustment Board,

> "the majority of said board properly examined claimant and their findings and decision therefrom did not support the decision of carrier's chief surgeon but they found and decided that claimant had no physical defects which would prevent him from carrying on his usual occupation as an engineer." (R 11.)

Nonetheless, the company did not interpret the Adjustment Board's findings as being favorable to appellant, and refused to reinstate appellant to active service or to award him back pay.

At this point, appellant initiated Action 2080-SD-W to enforce the award. He relied upon the award requiring the establishment of a three doctor panel and the written reports of two of the members thereof, his designee and the neutral member designated by agreement, to the effect that he was suffering from no disability which would prevent him from performing his assigned duties.[12] The carrier's motion for summary judgment upon the ground that the award did not have sufficient finality to confer jurisdiction upon the district court was granted.[13]

In an effort to invest the Board's award with the quality of finality demanded by the district court, appellant, once again, submitted his dispute with SD&AE to the Adjustment Board. The result was an interpretation and further award and order which issued on October 8, 1958. The Adjustment Board said:

> "We find from the record that the statements set out in claimant's submission are true; that a

[12]This was the previous action (Civil No. 2080-SD-W) referred to by carrier's manager of personnel in his affidavit filed November 28, 1960 (R 17:11) and by the district court in its opinion. (R 105:21.)

[13]The district court's opinion in Civil No. 2080-SD-W is reported at 161 F. Supp. 295. We note here, and will, again, *infra,* that the Court of Appeals for the Fifth Circuit in *Hodges v. Atlantic Coast R. Co.* (1962) 310 F. 2d 438, expressly rejected the rationale of this, the first *Gunther* case, and held such an award enforceable.

> board of three physicians was selected by agreement of the parties for the purpose of determining claimant's physical qualification for service; that the majority of said board properly examined claimant and that their findings and decision therefrom did not support the decision of carrier's chief surgeon but that they found and decided that claimant had no physical defects which would prevent him from carrying on his usual occupation as engineer." (R 11.)

Thus, having determined that—

> "(T)he issue of fact upon which the prior Award 17 646 was conditioned having been determined in favor of claimant, said conditional award should be made absolute and final and the claim sustained as therein provided.",

the Board made its award as follows:

> "(C)laim sustained for reinstatement with pay for all time lost from October 15, 1955 pursuant to rule on the property.",

and ordered carrier to make said award effective on or before November 8, 1958. (R 11-12.)

On September 26, 1960, appellant initiated this action seeking an enforcement of said award and order of October 8, 1958. In his petition, he simply alleged that, as of December 30, 1954, his "employment with defendant was governed by the terms of the Agreement by and between the San Diego and Arizona Eastern Railway Company and its locomotive engineers represented by the Brotherhood of Locomotive Engineers." Further, he alleged that said agreement

did "not require employees covered by same to retire from active service at any stated age limit" and that "by the terms of the agreement . . . petitioner had seniority rights which entitled him to continue in the active service of defendant as a locomotive engineer." (R 3:6-15.) With respect to the physical disqualification, he alleged that it constituted "in fact, imposition upon petitioner of compulsory retirement in violation of petitioner's rights under the agreement" in that "(A)t said time petitioner's physical and mental fitness was comparable to that of men much younger than he and he was qualified physically to perform the duties which would be required of its locomotive engineers." (R 3:20-26.) He then set forth the facts relating to his resort to the Board and incorporated the results thereof, the award, as interpreted, in the form of exhibits thereto. (R 3-4.) He prayed for an order enforcing same. (R 5.)

In its answer, SD&AE admitted that petitioner's employment with defendant "was subject to the terms of a collective bargaining agreement by and between the San Diego and Arizona Eastern Railway Company and its locomotive engineers represented by the Brotherhood of Locomotive Engineers, and that there was no provision in said agreement relating to the age at which employees covered thereby should retire from active service;" and admitted that it removed appellant from active service on December 30, 1954; but denied that he had rights to continue in active service or that appellant was, at that time, qualified physically to continue in active service. (R 57.)

The pertinent allegations of the affidavits filed in support of, and in opposition to, the second motion for summary judgment were the following:

1. In December, 1954, ". . . the applicable written agreement was a green-colored booklet dated March 1, 1935." (Schomp affidavit filed May 16, 1961. R 70:9.)

2. "On December 30, 1954, there was no provision in the collective bargaining agreement applicable to the employment of Mr. Gunther providing for a three-doctor panel or for a medical review of any nature with respect to the findings of company physicians and surgeons relating to the physical qualifications of locomotive engineers to perform services." (Schomp affidavit filed May 15, 1961. R 70:15.)

3. There were "rules" some, but not all, of which were contained in the company's "Rules and Regulations of the Transportation Department"[14] which "must be complied with by the employees and are not a part of the collective bargaining agreement." (Schomp affidavit filed May 16, 1961. R 71:14-21.)

4. "Prior to and since December 30, 1954," the green colored booklet "has been the contract governing the employment of Mr. Gunther." (Schomp affidavit filed May 16, 1961. R 71:27.)

5. This "contract (the green booklet) contained no provision creating a three-doctor panel to review the physical condition of a locomotive engineer who

[14]The booklet "Rules and Regulations of the Transportation Department" is Exhibit B to Mr. Schomp's affidavit filed May 16. It is found at R 72½.

has been removed from his position or restricted from performing service" until December 1, 1959, when, as a result of a demand made upon respondent by Mr. J. P. Colyar, General Chairman of the BLE, such a provision became effective by means of an "amending agreement." (Schomp affidavit filed May 16, 1961. R 71:27-72:10.)

6. Appellant, as General Chairman of the BLF&E, nonetheless was "for many years actively engaged in enforcing the provisions of the Agreement referred to in his petition" and "thoroughly familiar with said Agreement and its interpretation and application by the parties thereto in the operations of defendant." (Gunther affidavit filed May 29, 1961. R 99:24-31.)

7. Said agreement adopts the principle of seniority and provides:

> "Article 35—Seniority
>
> Section 1
>
> Rights of engineers shall be governed by seniority in service of the Company as engineers and seniority of the engineer as herein defined shall date from first service as an engineer.
>
> Section 3 (b)
>
> Where there is a surplus of engineers for the business of the district, the oldest engineer in point of seniority shall have the preference for employment." (Gunter affidavit filed May 29, 1961. R 100.)

8. Said agreement also adopts the principle of discharge only for good cause and states:

"Article 47—Investigations

Section 1 (b)

No engineer shall be suspended or discharged, except in serious cases, where a fault is apparent beyond reasonable doubt, until he has had a fair and impartial hearing before the proper officials.

Section 1 (e)

If an engineer is suspended or discharged and is proven to have been innocent of the offense charged, he shall be reinstated and paid rate as set forth in Appendix 'B' for time lost on such account."

9. That, with respect to reduction in force, said agreement provided:

"Article 38—Reduction of force

Section 1 (a)

When, from any cause, it becomes necessary to reduce the number of engineers on the engineers' working list, those taken off may, if they so elect, displace any fireman their junior under the following conditions:

Second: That when reductions are made they shall be in reverse order of seniority." (Gunther affidavit filed May 29, 1961. R 100.)

10. That the foregoing provisions were "vague, ambiguous and insufficiently certain to specify, in and of themselves, the precise rights of the employees covered thereby with respect to duration of employment and the rights, if any, of the employer to restrict same." (Gunther affidavit filed May 29, 1961. R. 100:28.)

11. "That at all times pertinent herein the interpretation of said provisions, and their application to defendant's operations, were done by reference to a long history of custom and practice in the railroad industry; that, for example, because the '. . . (R)ights of engineers . . . governed by seniority in the service of the Company . . .' were not specified in detail in said Agreement, their substance could only be, and was, determined by resort to custom and practice in the industry." (Gunther affidavit filed May 29, 1961. R 100:32-101:7.)

12. "That at all times pertinent herein it was the custom and practice for engineers covered by said Agreement to bid for and retain assignments to active duty on the basis of seniority; that, therefore, the most senior engineer was entitled to the assignment of his preference and, in the event of elimination of such assignment by reduction of work force or otherwise, such senior engineer had the right to displace a junior and thus continue in active employment; that defendant's removal of petitioner from the assignment of his choice on December 30, 1954 was in violation of petitioner's seniority rights as conferred by said Agreement because, at said time, petitioner was senior to the engineer who replaced him on said assignment and, for that matter, to all other engineers in the employ of defendant." (Gunther affidavit filed May 29, 1961. R 101:8-20.)

13. "That at all said times it was never the custom and practice for the active employment of an engineer covered by said agreement to be terminated by retire-

ment against the will of such engineer." (Gunther affidavit filed May 29, 1961. R 101:21-23.)

The trial court found the "collective bargaining agreement between plaintiff and *defendant's* Union, *Brotherhood of Locomotive Engineers*"[15] to be the green booklet. (Finding of Fact 4, R 156.) It held that the provisions according seniority rights and protection against discharge except for good cause cannot, as a matter of law, be deemed to restrict the "residual right" of respondent carrier to remove its engineer employees from active service upon an ex parte determination of physical unfitness.[16] It was the court's view that, because the green booklet is silent thereon, the carrier retained—had not "surrendered"—said right.[17] Despite the "bare bone" aspect of the green booklet (it contains, as the court noted, no reference to physical disability of engineers at all except a provision conferring a right upon engineers disabled by loss of one eye to displace juniors)[18] the court had "no difficulty" in interpreting its provisions as to seniority.[19] The court was not impressed with petitioner's contention that, since the terms of the agreement (not just the green booklet) relating to the rights of engineers to remain in active service,

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[15]The district court, obviously, intended this finding to read "between defendant and plaintiff's union." But the error of ascribing to Mr. Gunther membership in the BLE was not inadvertent. As late as the argument on the Rule 60(b) motion, the district court was still referring to the BLE as "petitioner's union".

[16]Opinion, Sept. 26, 1961. R 124 *et seq.*

[17]Ibid.

[18]Ibid. R 116.

[19]Ibid. R 119.

whether by reason of seniority rights, right to continue in service in absence of good cause for discharge, or otherwise, were far from clear, and since the circumstances, scope and bounds thereof were to be found "by reference to a long history of custom and practice in the railroad industry," petitioner should not be precluded from his opportunity to present evidence, extrinsic to the green booklet, at a trial upon the merits.

Finding, then, no limitation in the green booklet upon the carrier's residual right to disqualify its locomotive engineers from active service upon an ex parte determination of physical unfitness, the court held that the action of the Board in requiring the establishment of a three physician panel to be in excess of its jurisdiction to "interpret and apply" existing agreements.[20] Having thus concluded the award and order sought to be enforced was, in its view, a nullity, the court granted summary judgment because "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law."[21]

Following the docketing of the appeal from the summary judgment, on or about Feb. 28, 1962 appellant's attorney attended a conference at the office

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[20]"The Board should have interpreted the Agreement as we have done here, and should have dismissed the claim prior to making its first, or conditional award." (Opinion of Sept. 26, 1961. R 132.)

[21]Opinion, Sept. 26, 1961 (R 134); Conclusions of Law 5 and 6 (R 153-154).

of J. P. Colyar, Chairman of the General Committee of Adjustment, BLE. At said conference said attorney learned, for the first time[22], the following:

1. That effective January 1, 1945, as a result of an exchange of correspondence[23] between SD&AE and the BLE, acting for the engineer employees of SD&AE, the carrier agreed to apply "interpretations made on articles in Pacific Lines Engineers' Agreement that are similarly worded in SD&AE Engineers' Agreement to SD&AE Engineers' Agreement."[24]

2. Also, as a result of said exchange of correspondence, a new provision, Article 9, Section 1 (c), identical to Article 12, Section 1 (c) of the Pacific Lines-BLE Agreement, was added to the SD&AE-BLE Agreement. Thus, as of January 1, 1945 the Pacific Lines-BLE Agreement and the SD&AE-BLE Agreement contained the identical provision:

> "Engineers assigned to regular runs, who through no fault of their own are not used thereon and their runs are worked in whole or in part, will be allowed the full mileage of their assignments."[25]

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[22]The affidavit of Charles W. Decker, filed in support of appellant's Rule 60(b) motion, explains in some detail how he continued under the misapprehension that the green booklet was the entire written agreement until his conference with Mr. Colyar. (R 224-231.)

[23]Exhibits A through J to Colyar affidavit filed June 5, 1962 in support of appellant's Rule 60(b) motion. (R 193-208.)

[24]Exhibit H, Colyar affidavit filed June 5, 1962. (R 206.)

[25]Ibid. (R 204); Colyar affidavit filed June 5, 1962 (R 190: 15-18).

3. Effective October 2 or November 13, 1947, as a result of the adjustment of a grievance arising out of the claim of one C. O. Callaway, and memorialized in letters over the signatures of the Assistant General Manager and the Assistant Manager of Personnel of the Southern Pacific Company addressed to BLE officials, agreement was reached with respect to application of Article 12, Section 1(c) of the Pacific Lines-BLE Agreement as follows:

> "We further advised you, with the understanding that it is the Company's responsibility to prescribe physical standards required of employees to qualify them for service and to remain in service, that we were agreeable in any case where an engineer was removed from his position on account of his physical condition and he desires the question of his physical ability to conform to prescribed physical standards to be determined, the management was agreeable to setting up a special panel of doctors consisting of one doctor selected by the Company, one doctor selected by the employe or his representative, the two doctors thus selected to confer and appoint a third doctor specializing in the disease, condition or physical ailment from which the employe is alleged to be suffering. The management and the engineer will each defray the expenses of their respective appointee, and will each pay one-half of the fee and traveling expenses of the third appointee. This panel of doctors upon completing their examination will make a full report in duplicate, one copy each to be sent to the General Manager and the engineer. At the time of making the report a bill for the fee and traveling expenses,

> if there be any, of the third appointee shall be made in duplicate, one copy to be sent to the General Manager and one copy to the engineer."[26]

According to the affidavit of Mr. Colyar, this constituted an "interpretation" upon said Article 12, Section 1(c).[27]

4. That it was Mr. Colyar's opinion that, because of the foregoing, as of no later than November 13, 1947 and to and including December 30, 1954, the Agreement between the SD&AE and its engineers as represented by the BLE contained a provision specifically providing for resort to a three physician panel to determine an engineer employee's physical fitness to continue in active service, and,[28]

5. That the subsequent demand[29] by Mr. Colyar under date of August 28, 1959 for a new Section 3(a) of Article 68 of the SD&AE-BLE Agreement relating to a three physician panel for determining the physical fitness of engineer employees to continue in active service was not for the purpose of creating a new contractual right but "to clarify and make more explicit the existing provision" for such right.[30]

Upon learning the foregoing, appellant secured an order from the district court indicating its intention

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[26]Exhibits K and L, Colyar affidavit filed June 5, 1962. (R 209-210, 213.)

[27]Colyar affidavit filed June 5, 1962. (R 190:27.)

[28]Ibid. (R 191:16-29.)

[29]Exhibit M, Colyar affidavit filed June 5, 1962 (R 214-215); Exhibit C, Schomp affidavit filed May 16, 1961 (R 73).

[30]Colyar affidavit filed June 5, 1962. (R 192:2-11.)

to entertain his motion to be relieved from the operation of the summary judgment and thereby secured an order of this court remanding the record. Appellant's Rule 60(b) motion for relief from the operation of the summary judgment was heard on affidavits which included averments as to the facts set forth above and, additionally, averments of appellant explaining the circumstances which prevented him from knowing about the provisions for the three physician panel as created by the correspondence between the carrier and officials of the BLE. In his affidavit appellant emphasized that at no time was he a member of the BLE; that he did not have access to the correspondence which resulted in the establishment of the three-physician panel provision; that his knowledge of the SD&AE-BLE Agreement was limited to the contents of the green booklet and that he did not know of the correspondence establishing the three doctor panel method of resolving dispute as to physical fitness until he read Mr. Colyar's affidavit.[31]

On April 10, 1963, the district court made its order denying said motion. (R 319-320.) It was the court's view that appellant's failure to discover the correspondence in question was not justified; that "(R)ecourse to statements in affidavits filed by defendant is not necessary for us to see that petitioner has not produced and would be able to produce at trial any evidence which could lead to a determination in his favor.[32] The court reported that it could "find nothing

[31]Gunther affidavit filed June 5, 1962. (R 220-222.)

[32]Opinion of March 29, 1963. (R 314:9-15.)

in the affidavits filed by petitioner or the exhibits attached to such affidavit, nor in any material presented by petitioner, to show that a three-physician panel was ever applicable prior to 1959, to engineers on the San Diego and Arizona Eastern Railroad."[33]

This appeal followed.

SPECIFICATION OF ERRORS

1. The district court erred in granting summary judgment for appellee because the pleadings and affidavits did *not* disclose that no genuine issue of fact remained for trial.

2. The district court erred in granting summary judgment for appellee because this case, involving the important public issue of the right of a railroad employee to enforcement of an award of the National Railroad Adjustment Board in his favor, which award was based upon the Board's interpretation and application of the applicable collective bargaining agreement, is not suited to disposition by summary judgment proceedings.

3. The district court erred in granting summary judgment for appellee because the award sought to be enforced was predicated upon the implied finding of the Board that, in terminating appellant's active employment, the carrier acted contrary to the terms of the applicable collective bargaining agreement. Since such finding, by statute, constitutes prima facie

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[33]Ibid. (R 314:27-32.)

evidence in support of appellant's petition, a factual issue existed for trial.

4. The district court erred in denying appellant's motion for relief under Rule 60(b) of the Federal Rules of Civil Procedure because the newly discovered evidence offered by appellant in support of said motion raised doubt as to whether the applicable collective bargaining agreement contained a provision consistent with the Board's interpretation of same and, under all the circumstances of this case, including appellant's explanation for his failure to discover said evidence prior to the grant of summary judgment, created good cause for grant of the relief requested by said motion.

ARGUMENT

I. RESUME OF FACTS.

Following some forty four years of service, appellant was removed from service as a locomotive engineer upon an ex parte determination by the carrier's physicians that he was a candidate for a heart attack. Having acted as General Chairman of the BLF&E for many years, he sought to assert what he deemed to be his rights as established by the applicable agreement—the agreement between the carrier and its engineer employees represented by the BLE. The result was an award of the National Railroad Adjustment Board, First Division, which, initially, established a three physician panel to determine the issue of appellant's physical fitness and, finally, unconditionally ordered

reinstatement with back pay. The court below, deeming the entire applicable agreement to be contained in the green booklet of November 30, 1938, found no ambiguity in its provisions relating to appellant's right to continued active employment and the carrier's corollary right to terminate such employment, interpreted same as placing no restriction upon the carrier's "residual right" to determine the physical fitness of its engineer employees, and concluded that the Board's award was *ultra vires* and, hence, unenforceable. It therefore granted the carrier's motion for summary judgment, holding that there was no issue as to any material fact and that the carrier was entitled to judgment as a matter of law.

II. TESTED BY THE RULES OF LAW APPLICABLE TO SUMMARY JUDGMENT PROCEEDINGS, THE JUDGMENT APPEALED FROM IS INFIRM. THE RECORD LEAVES DOUBT AS TO THE ABSENCE OF MATERIAL ISSUES OF FACT TO SUPPORT THE JUDGMENT OF THE DISTRICT COURT. ALSO, POLICY CONSIDERATIONS MILITATE AGAINST DISPOSITION OF THIS CASE BY SUMMARY JUDGMENT.

A. The applicable rules of law.

The rules controlling on motion for summary judgment are well settled and need not be elaborated upon here. The trial court's function is to determine whether a genuine factual issue exists; not to resolve any such issues. The Supreme Court has said recently:

> "Summary judgment should be entered only when the pleadings, depositions, affidavits and admissions filed in the case 'show that (except as

to the amount of damages) there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.' Rule 56(c), Fed. Rules Civ. Proc. 28 U.S.C.A. This rule authorizes summary judgment 'only when the moving party is entitled to judgment as a matter of law. *When it is quite clear what the truth is,* * * * [and where] no genuine issue remains for trial * * * [for] the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try.' *Sartor v. Arkansas National Gas Corp.,* 321 U.S. 620, 627 (1944)." *(Poller v. Columbia Broadcasting System,* (1962), 368 U.S. 464, 467, 7 L. Ed. 2d 458, 461; emphasis added.)

The moving party's burden of proof that there are no factual issues for trial is a heavy one.

"On a motion for summary judgment the burden of establishing the nonexistence of any genuine issue of fact is upon the moving party, all doubts are resolved against him, and his supporting affidavits and depositions, if any, are carefully scrutinized by the court. * * * On appeal from an order granting a defendant's motion for summary judgment the circuit court of appeals must give the plaintiff the benefit of every doubt." *(Neff Instrument Corp. v. Cohu Electronics, Inc.* (9 Cir. 1959) 269 F. 2d 668, 673-674, quoting from *Walling v. Fairmont Creamery Co.* (8 Cir. 1943), 139 F. 2d 318, 322.)

It is error to grant such a motion if there is the "slightest doubt" as to whether there is a factual issue for trial.

> "We take this occasion to suggest that trial judges should exercise great care in granting motions for summary judgment. A litigant has a right to a trial where there is the slightest doubt as to the facts, and a denial of that right is reviewable; but refusal to grant a summary judgment is not reviewable. Such a judgment, wisely used, is a praiseworthy timesaving device. But, although prompt dispatch of judicial business is a virtue, it is neither the sole nor the primary purpose for which courts have been established. Denial of a trial on disputed facts is worse than delay. * * * The district court would do well to note that time has often been lost by reversals of summary judgments improperly entered." (*Cox v. American Fidelity & Casualty Co.* (9 Cir. 1957) 249 F. 2d 616, 618, quoting from *Doehler Metal Furniture Co. v. United States* (2 Cir. 1945) 149 F. 2d 130, 135.)

The appellate court reviews the record in the light most favorable to appellant. (*Poller v. Columbia Broadcasting System, Inc.* [1962] 368 U.S. 464, 473, 7 L. Ed. 2d 458, 464.)

Of particular application to the case at bar is the rule that the moving party has the burden of clearly establishing the lack of any triable issue of fact *by a record that is adequate for decision of the legal question presented.* Unless the record is clearly adequate the court should either grant a continuance so that the inadequacy may be corrected or deny the motion. (Moore's Federal Practice, Second Edition, Vol. 6, p. 2158.) Summary judgment is improper where the facts are meagre or where further inquiry into the

facts is desirable to clarify the application of the law. (Barron and Holtzoff, Federal Practice and Procedure, Rules Edition, Vol. 3, pp. 127-128; see *Boston & M. R. R. Co. v. Lehigh & N. E. R. Co.* [D.C. N.Y. 1960] 188 F. Supp. 486; *A. Smith Bowman & Sons Inc. v. Schenley Distillers* [D.C. Del. 1961] 190 F. Supp. 586.) Even where it can be said that an appellant failed to disclose a factual issue at the trial level in response to the moving papers of the moving party, but raises same on appeal,

> "if the appellate court becomes convinced that the appellant, acting in good faith, has somehow or other failed to raise at the trial court level a factual issue that is, nonetheless, present in the case, it should make such a disposition of the appeal as will permit him to do so." (Moore's Federal Practice, Second Edition, Vol. 6, p. 2365.)

Also of particular interest here is the rule that where the record presents a question of ascertaining the meaning of a contractual provision, summary judgment is improper if the contract is ambiguous and there is a factual issue as to its meaning, or if the parties have not integrated their agreement so that the parol evidence rule does not bar evidence extrinsic to a particular instrument of the actual agreement of the parties. Thus, in *Osborn v. Boeing Airplane Company* (9 Cir. 1962) this court said:

> "Where, as here, the existence and terms of a contract must be determined by drawing inferences of fact from all the pertinent circumstances, and the possible inferences are conflicting, the choice is for the jury." (309 F. 2d 99, 103),

and, in *International Union etc. v. American Zinc L. & S. Co.* (9 Cir. 1963), summary judgment was reversed, this court holding that the meaning to be attributed to the phrase "union membership clause", as it appeared in a collective bargaining agreement, was not so self-evident as to bar evidence outside the agreement itself to show what the parties meant by those words and, therefore, that there should be a trial to enable the parties to offer evidence in aid of their respective interpretations of the language. (311 F. 2d 656, 660.)

Finally, we call the court's attention to the authorities which hold summary judgment improper in cases involving constitutional or other large public issues which normally need the full exploration of a trial. In *Kennedy v. Silas Mason Co.* (1948), for example, the Supreme Court refused to decide a case involving application of the Fair Labor Standards Act upon a record provided by summary judgment proceedings. The court said:

> "We do not hold that in the form the controversy took in the District Court that tribunal lacked power or justification for applying the summary judgment procedure. But summary procedures, however salutary where issues are clear cut and simple, presents a treacherous record for deciding issues of far flung import on which this court should draw inferences with caution from complicated courses of legislation, contracting and practice.
>
> "We consider it the part of good judicial administration to withhold decision of the ultimate questions involved in the case until this or an-

> other record shall present a more solid basis of findings based on litigation or on a comprehensive statement of agreed facts." (334 U.S. 249, 256-257, 92 L. Ed. 1347, 1350-1351.)

We will describe in more detail below the circumstances of this case which bring it within the ambit of this rule.

B. The pleadings presented a factual issue as to whether appellant's removal from active service was in violation of his seniority rights or in violation of his right to continued active employment in the absence of good cause for discontinuance thereof. The affidavits filed upon motion for summary judgment did not extinguish this issue.

In his petition for enforcement of the Board's award appellant alleged that his employment "was governed by the terms of the Agreement by and between the San Diego & Arizona Eastern Railway Company and its locomotive engineers represented by the Brotherhood of Locomotive Engineers." (R 3:6.) (This court will note that he did *not* allege the agreement to be a written agreement nor did he refer to any particular instrument. He also alleged that the "Agreement does not require employees covered by same to retire from active service at any stated age limit" (R 3:10), and that "at all times . . . petitioner had seniority rights which entitled him to continue in the active service of defendant as a locomotive engineer." (R 3:12.) He alleged further that "on December 30, 1954, shortly after petitioner's seventy first birthday, defendant removed petitioner from active service on the ground that he was not

physically qualified to perform the duties of locomotive engineer" (R 3:17), but that "(A)t said time, petitioner's physical and mental fitness was comparable to that of men much younger than he and he was qualified physically to perform the duties which defendant required of its locomotive engineers." (R 3:20.) Further, he alleged that "(S)aid disqualification of petitioner by defendant was, in fact, imposition upon petitioner of compulsory retirement in violation of petitioner's rights under said Agreement." (R 3:23.) Finally, he alleged that "(B)y reason of the premises, petitioner has been deprived of his right, pursuant to said Agreement, to continue in the active service of defendant as a locomotive engineer since December 30, 1954, and has thereby sustained a wage loss to the date hereof in the approximate amount of $50,000.00." (R 4:30.)

In addition, he incorporated into his petition the finding of the Adjustment Board, with respect to the applicable agreement, that—

> "It is true that the carrier has the right and responsibility of determining within proper limits the physical fitness of employes to remain in service. It is also true that the employe has the right to priority in service according to his seniority *and pursuant to the agreement* so long as he is physically qualified. Where these two rights come into collision it has consistently been held by this Division that it has jurisdiction to determine whether the employe has wrongfully been deprived of service." (R 7-8, emphasis added.)

Appellee's answer admitted that appellant's employment was subject to the terms of a collective bargaining agreement as alleged by appellant and that "there is no provision in said agreement relating to the age at which employees covered thereby should retire from active service." (R 57:6.) It denied that appellant had seniority rights which entitled him to continue in active service (R 57:16); admitted that it removed him from active service on December 30, 1954 "upon advice of the Chief Surgeon that petitioner had been physically disqualified from performing such service after physical examination." (R 57:16.) Appellee denied appellant's "allegation that he was qualified physically to perform the services required of him (R 57:20); that said disqualification constituted imposition upon appellant of compulsory retirement in violation of his rights under the agreement (R 57:20); and that appellant had been deprived of his rights pursuant to the agreement to continue in active service from and after December 30, 1954. (R 57:20.)

Thus, the pleadings presented a factual issue, to wit: was appellant, on December 30, 1954, qualified physically to perform the duties of locomotive engineer and, if so, was his disqualification by appellee in violation of his rights under the agreement?

1. **The green booklet purporting to be the applicable agreement as of November 30, 1938 filed in support of the motion for summary judgment is, clearly, not the entire applicable agreement as of December 30, 1954, or, at the very least, creates uncertainty and is ambiguous in this regard and with regard to the rights of engineers alleged by the carrier to be physically disqualified for active service. Accordingly, the district court erred in determining therefrom that, as of December 30, 1954, appellant did not have a contractual right to continue in active service if he, in fact, was physically qualified to do so.**

On the motion for summary judgment which led to the judgment from which this appeal is taken, appellee sought, by affidavit of its manager of personnel, Mr. K. K. Schomp, to extinguish the factual issue presented by the pleadings by placing the green booklet before the court and asserting that "on December 30, 1954, there was no provision in the collective bargaining agreement applicable to the employment of Mr. Gunther providing for a three-doctor panel or for a medical review of any nature with respect to the findings of Company physicians and surgeons relating to the physical disqualification of locomotive engineers to perform service." (R 70:15.) But the attempted demonstration failed, because Mr. Schomp's affidavit makes it abundantly clear that the green booklet, Exhibit A thereto, did not contain the entire agreement of the parties as of December 30, 1954. Therefore, from the absence of any provision therein specifically limiting the carrier's right to determine the physical qualifications of its employees, the court could not infer there was no such provision anywhere in the applicable agreement.

It is interesting to note that Mr. Schomp's affidavit leaves us in doubt as to where the collective bargaining agreement is to be found. He states: "In December, 1954 the applicable *printed* agreement was a green colored booklet dated March 1, 1935." (R 70:10.) He then tells us that the Company "has published a number of rules concerning its operations, the conduct and safety of its employees, physical examinations and standards and other subjects" and that these rules "must be complied with *and are not a part of the collective bargaining agreement.* (R 71:20.) Then he reveals that all of the terms of the applicable agreement are not to be found in the "applicable printed agreement" (R 70:9-10) by showing that, effective December 1, 1959 the existing agreement was amended as a result of a written demand made pursuant to the Railway Labor Act (R 72:3; Exhibit C to Schomp affidavit filed May 16, 1961, R 73-74) and that said amendment is evidenced by a written memorandum signed by Mr. Schomp and Mr. Colyar and *not by its incorporation into the "applicable printed agreement."* (Exhibit D to Schomp affidavit filed May 16, 1961, R 75-76.)

But the conclusive evidence that the green booklet was not the entire agreement of the parties as of December 30, 1954 is the booklet itself. It is inconceivable that the collective bargaining agreement could have undergone no changes from November 30, 1938 until December 30, 1954. The booklet contains no provision for expiration of the agreement's term; instead Article 68 provides that it shall "continue in effect

. . . until either party desiring to change any of the foregoing rules or regulations shall have given notice in writing of the change or changes desired.'' (Green booklet, p. 82.) The continuous negotiation method of collective bargaining in the railroad industry is also evidenced by Article 66 of the green booklet which provides that ''all controversies affecting locomotive engineers will be handled in accordance with the *recognized interpretations* of the Engineer's contract as agreed upon between the Committee of the Brotherhood of Locomotive Engineers and the Management'', and that ''(I)n matters pertaining to discipline, *or other questions not affecting changes in the Engineer's contract*, the officials of the Company reserve the right to meet any of their employees whether individually or collectively." (Green booklet, p. 81.)

It is obvious, we submit, that the green booklet did not, as the district court mistakenly concluded, contain all of the terms of the applicable agreement. Other provisions were to be found in other documents reflecting changes resulting from demands under Article 68 and interpretations as referred to in Articles 66 and 67. Not having the entire agreement before it, the district court could not find, as it did, that ''said collective bargaining agreement . . . contained no provision limiting the right of defendant to remove and retire plaintiff from active service upon a finding by defendant's physicians that plaintiff was physically disqualified from active service." (R. 157: 28), or that ''said collective agreement contained no provision for a board of physicians to review the

findings of defendant's physicians as to physical disqualification of its employees." (R 158:3.)

A further doubt as to the soundness of the lower court's conclusion that "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law (R 159:4) is raised by the allegations of appellant's affidavit, and the other evidence, on the subject of the ambiguity created by the contents of the green booklet. The district court rejected appellant's assertion that the provisions of the booklet relating to seniority and establishing his right to continued service in the absence of good cause for removal therefrom are "vague, ambiguous and insufficiently certain to specify, in and of themselves, the precise right of the employees covered thereby with respect to duration of employment and the rights, if any, of the employer to restrict same" (R 100:28), and that "the interpretation of said provisions, and their application to defendant's operations, were done by reference to a long history of custom and practice in the industry." (R 100:32-101:3.) The district court reported "no difficulty in ascertaining the meaning of seniority as it appears in this Agreement" (R 119:24) and deemed the seniority provisions to have no restrictive effect upon the company's right to remove appellant from active service. (R 124:6.) Likewise, the provision conferring upon employees the right not to be suspended or discharged, he found, was without limiting effect upon said "residual right". (R 124:6.)

The lower court arrived at these conclusions only by interpreting the language of the green booklet. On motion for summary judgment, it could do this only if the booklet was an integrated, and non-ambiguous, expression of the entire agreement of the parties. We have already shown that it was not the entire agreement of the parties. We suggest here that, even if it be deemed the entire agreement, the booklet itself, when read in the light of appellant's characterization of its provisions as vague, ambiguous and insufficiently certain, is, clearly, not the type of integrated and unambiguous instrument which would bar parol evidence as to its meaning and, therefore, support summary judgment.

We are concerned here with the respective rights and duties of the parties in the event of a dispute as to the employee's physical qualification to continue in active service. The only reference in the green booklet to physical disability is found in Article 29 where we learn that "(W)hen an engineer is physically disabled on the account of loss of the sight of one eye, and is required to give up his run, he will have the privilege of displacing any engineer his junior in branch service." (Green booklet, p. 65.) Is is reasonable to infer from this that, on the entire question of the rights of allegedly disabled employees, the parties chose to confine their agreement to making provision only for those employees suffering the loss of one eye? Or, is it more reasonable to infer that, in the railroad industry, it is not the custom to in-

corporate into a single instrument all matters upon which agreement has been reached but, instead, to rely, in part, upon materials extrinsic to the printed booklet in asserting contractual rights and duties? We deem the latter inference the more reasonable and conclude that, at the least, ambiguity exists which requires resort to evidence extrinsic to the "bare bone" booklet in order to ascertain what was the agreement of the parties on this subject.

2. **The presumptive validity of the Board's finding, incorporated into appellant's petition, that "pursuant to the agreement" appellant had a right to continue in service "so long as he is physically qualified" was not rebutted and, indeed, could not be rebutted, on the motion for summary judgment. Implicit in the Board's award is its finding that, because appellant was, in fact, qualified physically to continue in service on December 30, 1954, the carrier suspended him from further service without cause, or acted arbitrarily or in bad faith. Accordingly, the district court erred in granting summary judgment and depriving appellant of the right to present these findings and other evidence in support of his claim against the carrier to the trier of fact.**

We have demonstrated above how the district court fell into error by assuming the green booklet to constitute the entire applicable agreement. In making this argument we have assumed, *arguendo*, that unless there was a contractual provision for a three physician panel in effect on December 30, 1954, the Board's award may not be the predicate of this enforcement action.

However, as the following discussion will show, the capacity of the award to support this enforcement action is not dependent upon there being such a pro-

vision in the applicable agreement. This follows from the fact that the applicable agreement prohibited discharge or suspension without good cause therefor. (Green booklet, p. 74.)

The issue before the Board, and therefore, before the district court, was whether appellant had been removed from active service *for good cause.* Unquestionably the Board had jurisdiction of this question arising under the collective bargaining agreement. The carrier's position before the Board was that appellant had been removed from active service for cause because he was not physically qualified for such service. The Board, not being composed of experts in medicine, was required to obtain the opinions of such experts in order properly to dispose of this question. In *Hodges v. Atlantic Coast R. Co.* (1962), 310 F. 2d 438 the Court of Appeals for the Fifth Circuit clearly recognized the necessity of this procedure. It therefore upheld an Adjustment Board order establishing a three physician panel although the collective bargaining agreement did not contain any specific provision for same. The Court of Appeals in *Hodges* also properly tells us that the Board could use the findings of the medical panel in making a determination on the ultimate issue before it as to whether the employee had been discharged by the carrier in violation of the "cause" provisions of the contract, or whether the carrier had acted arbitrarily. Certainly, where the bargaining agreement limits management's rights to discharge or suspend for cause, the body having jurisdiction over the dispute, here

the Adjustment Board, may order the reinstatement of the employee if the carrier's action is erroneous, arbitrary or in bad faith. (*Tinnon v. Missouri Pac. R. Co.* (8 Cir. 1960), 282 F. 2d 773. And in making that determination, the Board is not required to accept management's investigation and basis for making the discharge or rendering the discipline as being determinative of the issue. (*Martin v. Southern Ry. Co.* (S.Ct.S.Car.1962), 126 S. E. 2d 365.) In effect, the court's decision herein bars the Board from making any determination on the questions submitted to it.

By describing the issue in terms of the Board's jurisdiction to invoke the expert services of physicians in reaching its ultimate finding and by gratuitously conferring on management the prerogative of making a final determination in this area, the lower court violated the principles set forth above and fatally overlooked the basic issue before it and the Board. By emphasizing the lack of a medical panel provision, as it interpreted the applicable agreement, and by holding that this was the deciding factor as to the jurisdiction of the Board, the lower court failed to accord the findings of the Board the weight vested in them by Section 153, First (p) of the Railway Labor Act, and further failed to permit appellant the right to rely upon the Board's finding that the carrier had failed to remove appellant from active service for good cause and had acted arbitrarily, in bad faith, and in violation of the collective bargaining agreement.

Beyond this, the decision of the lower court improperly infringed on the Board's powers as an arbitrator as such powers have been defined in recent decisions of the United States Supreme Court. As this court is well aware, the Adjustment Board is an arbiter created by Section 3, First (i) of the Railway Labor Act to settle or adjust disputes growing out of grievances. (*Brotherhood of R. Trainmen v. Chicago River & Indiana R. Co.* (1957) 353 U.S. 30, 1 L. Ed. 2d 622.) Although the arbitration rendered by the Board is a statutory creation, agreements in other industries contain arbitration provisions which have been held enforceable under Section 301 of the Labor-Management Relations Act, 29 U.S.C. 185. (*Textile Workers v. Lincoln Mills* (1957) 353 U.S. 488, 1 L. Ed. 2d 972. Many of the problems confronting this court have been met previously in these cases. Some were resolved in the so-called Steelworkers Trilogy. (*United Steel Workers v. Enterprise Wheel & Car Corp.* (1960) 363 U.S. 593, 4 L. Ed. 2d 1424; *United Steelworkers v. American Mfg. Co.* (1960) 363 U.S. 564, 4 L. Ed. 2d 1403; *United Steelworkers v. Warrior & Gulf Nav. Co.* (1960) 363 U.S. 574, 4 L. Ed. 2d 1409.

By basing its decision on its interpretation of the applicable agreement, and deciding that the agreement did not prohibit discharge upon the ground of physical disability because it contained no specific provision limiting the carrier's right to determine the physical fitness of its employees, the lower court disregarded the Supreme Court's pronouncements in the

Steelworker Trilogy. The court in this case, as did the lower courts in *United Steelworkers v. American Mfg. Co.,* supra, showed a preoccupation with ordinary contract law in reaching its decision. In taking this position, the district court erroneously concluded that appellant's claim before the Adjustment Board was not meritorious and that the Adjustment Board lacked jurisdiction over the dispute. In the *American Mfg. Co.* case the collective bargaining representative had sought to arbitrate a grievance requesting reinstatement of an employee on the basis of the seniority provisions of the agreement. The employee had been injured on the job and in a workmen's compensation proceeding had been determined to be permanently partially disabled. The company took the position that it had not violated any of the seniority provisions of the agreement by refusing to reinstate the employee because of his physical disability. The lower courts, agreeing that the dispute was not subject to arbitration under their interpretation of the bargaining agreement, refused to compel arbitration. The Supreme Court, however, reversed on the ground that the collective bargaining agreement called for submission of all grievances to arbitration, not merely those that the court might deem to be meritorious. The court stated:

> "When the judiciary undertakes to determine the merits of a grievance under the guise of interpreting the grievance procedure of collective bargaining agreements, it usurps a function which under the regime is entrusted to the arbitration tribunal." (363 U.S. 564, 569, 4 L. Ed. 2d 1403, 1407.)

In the instant case, the court, by searching the contract for a specific provision for a medical panel, rendered a decision on the merits as to the meaning, interpretation and application of the collective bargaining agreement. In doing so, it erroneously limited and invaded the jurisdiction of the Adjustment Board, a body with jurisdiction commensurate with that of the arbitration board involved in the *American Mfg. Co.* case. By taking the position which it reached in its decision, the court specifically disregarded the explicit provisions of the bargaining agreement which were before the Board for decision, to wit, the seniority and just cause provisions.

By holding that the lack of specific provision for a medical panel placed discharges for medical reasons within the sole and exclusive prerogative of management, the court improperly excepted the dispute before the Board from arbitration. The validity of a similar adjudication was before the Supreme Court in the *Warrior and Gulf Nav. Co.* case. There, the bargaining representative protested the employer's practice of contracting out work performed by its employees. Although no specific contractual provision covered the situation, the union requested that it be submitted to arbitration under the grievance procedures of the collective bargaining agreement. The employer refused to arbitrate, contending that the contract excluded from arbitration matters which were strictly a management function. The lower court, looking to the contractual provision in regard to managerial rights and to the merits of the dispute,

held that the collective bargaining contract did not permit arbitration. The Supreme Court, however, held that only the specific exclusion of the matter from arbitration could deprive the arbitrator from jurisdiction. The court said that the lower courts were not entitled to look at the merits of the dispute; that it was the arbitrator who was to determine whether the agreement had been violated. In the case at bar the lower court, by dealing with the case on summary judgment, impinged on the jurisdiction of the Board. It prevented the appellant from implementing the Board's holding that his discharge was not for good cause as the Board's interpretation of the applicable agreement had caused it to find. We submit that this ruling violates the premises set forth in *Warrior and Gulf Nav. Co.*

Lastly, the Supreme Court ruled in *Enterprise Wheel* that, by providing for a grievance procedure terminating with arbitration, the parties submit to the arbitrator's construction of their agreement. It was held that the court should not overrule the arbitrator's construction of the contract because its interpretation of the contract differs from that of the arbitrator. Although it has been stated by some courts that in an action to enforce an Adjustment Board award the district court may re-try the findings of fact *de novo,* it has never held that the Board's decision as to the proper construction of the applicable agreement is not final in the absence of a showing that it is arbitrary or in violation of due process. Here, the district court has erroneously assumed this

power. By doing so it has reviewed the merits of the Board's construction of the contract, has invaded the peculiar jurisdiction of the Board, and has not accorded to the Board the expertize to which it is entitled. (*Washington Terminal Co. v. Boswell* (D.C. D.C. 1941) 124 F. 2d 235.)

If the Adjustment Board is to function in accordance with the Supreme Court's pronouncements on the subject of arbitration, it must be treated akin to arbitrators who are within the purview of the Steelworkers Trilogy. In fact, in *Brotherhood of Locomotive Engineers v. Louisville & N. R. Co.* (1963) 373 U.S. 33, 10 L. Ed. 2d 172, 179, Justice Goldberg, in dissent, interpreted the majority opinion as follows:

> "Given the premises of *Chicago River,* it must follow that such enforcement proceedings are governed by federal law as declared by this court in cases such as *Steelworkers v. American Mfg. Co.,* 363 US 564; *Steelworkers v. Warrior & Gulf Nav. Co.,* 363 US 574; and *Steelworkers v. Enterprise Corp.,* 363 US 593, * * *."

Following these precepts, the lower court could do no less than to hear this case on its merits. It is submitted that if these ground rules had been followed, the lower court could not have found on summary judgment for the carrier. If the court had traveled the course set by the Court of Appeals in *Hodges v. Atlantic Coast R. Co.,* supra, the court could only have found that the Board's award and order is valid and enforceable herein.

3. **In this lawsuit involving the judicial reception to be accorded to findings, award and order of the National Railroad Adjustment Board, policy considerations militate against disposition of same by summary judgment. This is particularly true in the light of recent Supreme Court decisions which limit the aggrieved railroad employee to his remedy before the Board and, if the carrier refuses to comply with an award in his favor, to the enforcement proceeding in federal court.**

We have previously noted the authority for the proposition that there are factual situations which do not lend themselves to disposition by summary judgment. The following is submitted in support of our contention that this is such a case.

In 1934 the Railway Labor Act was amended to provide for compulsory arbitration of disputes arising under collective bargaining agreements in the railroad industry.[34] The Board's awards were made "final and binding" except insofar as they contained a money award.[35] Provision was made for enforcement of same by an action in federal district court.[36]

[34]For discussion of the statutory scheme, legislative history, etc. see *Union P. R. Co. v. Price* (1959) 360 U.S. 601, 79 S. Ct. 1351, 3 L. Ed. 2d 1460; *Pennsylvania R. Co. v. Day* (1959) 360 U.S. 548, 79 S. Ct. 1322, 3 L. Ed. 2d 1422; *Brotherhood of R. Trainmen v. Chicago River & I. R. Co.* (1957) 353 U.S. 30, 77 S. Ct. 635, 1 L. Ed. 2d 857; *Slocum v. Delaware & L. R. Co.* (1950) 339 U.S. 239, 70 S. Ct. 577, 94 L. Ed. 795; *Order of Ry. Conductors v. Pitney* (1946) 326 U.S. 561, 66 S. Ct. 322, 90 L. Ed. 319; *Elgin J. & E. R. Co. v. Burley* (1945) 325 U.S. 711, 65 S. Ct. 1282, 89 L. Ed. 1887; *Washington Terminal Co. v. Boswell* (D.C. D.C. 1941) 124 F. 2d 235.

[35]"The awards of the several divisions of the adjustment Board shall be stated in writing, a copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award. In case a dispute arises involving an interpretation of the award, the division of the Board upon request of either party shall interpret the award in the light of the dispute." (45 U.S.C.A. 153(m).)

[36]Note 2, *supra*, p. 2.

Since then judicial reception to such awards has been ambivalent. Some courts have demonstrated reluctance to grant to the Board the "expertize adapted to interpreting such agreements."[37] Thus, awards not formulated in terms of finality comparable to judicial findings have been rejected when made the basis for enforcement proceedings.[38] Other and, we submit, more enlightened courts have granted to the work of the Board the weight which Congress intended. A good example of this is *Kirby v. Pennsylvania R. Co.* (3 Cir. 1951) 188 F. 2d 793. There, Goodrich, J., in reversing the lower court's rejection of an award upon the ground that it was too vague to be enforced, said: "We think courts should take the findings of these divisions of the Railroad Adjustment Board as they come and do what they can with them". (188 F. 2d 793, 796.) Another such example is *Hodges v. Atlantic Coast Line R. Co.* (5 Cir. 1962) 310 F. 2d 438. In that case the district court had refused enforcement to an award establishing a three physician panel in reliance, no doubt, upon the authorities cited

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[37]"Furthermore, the Board is acquainted with the established procedures, customs and usages in the railway labor world. It is the specialized agency selected to adjust these controversies. Its expertise is adapted not only to interpreting a collective bargaining agreement, but also to ascertaining the scope of the collective agent's authority beyond what the Act itself confers, in view of the extent to which this also may be affected by custom and usage." *(Elgin J. & E. R. Co. v. Burley* (1946) 327 U.S. 661, 664, 90 L. Ed. 928, 932.)

[38]See *Railroad Yardmasters of North America, Inc. v. Indiana Harbor Belt R. Co.* (7 Cir. 1948) 166 F. 2d 326; *System Federation etc. v. Louisiana & A. R. Co.* (5 Cir. 1941) 119 F. 2d 509; *Smith v. Louisville & N. R. Co.* (S.D. Ala. 1953) 112 F. Supp. 388; *Gunther v. San Diego & Arizona Eastern R. Co.* (S.D. Cal. 1958) 161 F. Supp. 295.

in note 38 *supra*. The Court of Appeals, however, expressly rejecting the rationale of those authorities, reversed and instructed the district court to retain jurisdiction of the cause pending final award of the Board based upon the findings of the three doctor board. (Thus, an ironic aspect of appellant's long struggle to implement the relief granted him by the Board is that he is now informed by the Court of Appeals for the Fifth Circuit that the district court should not have granted the company's motion for summary judgment in action 2080-SD-W.)

We urge that the more charitable view of the work of the Board exemplified by *Kirby* and *Hodges* is the correct one, particularly so in view of recent decisions of the Supreme Court which have the effect of severely restricting the area in which the aggrieved railroad employee can seek adjudication of his claim, and the power of his union to take economic action to force recognition of it.

It is now established that an award in favor of the carrier, for example, one denying relief to a railroad worker seeking reinstatement with back pay, is not a "money award" and, therefore, is "final and binding" and the aggrieved employee "is wholly without further remedy or recourse".[39] The carrier is under no such disability, however, for if the award is in the employee's favor, not only may the carrier force ju-

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[39]*Union P. R. Co. v. Price* (1959) 360 U.S. 601, 79 S. Ct. 1351, 3 L. Ed. 2d 1460. See dissenting opinion of Goldberg, J. in *Locomotive Engineers v. Louisville & N. R. Co.* (1963) 373 U.S. 33, 10 L. Ed. 2d 172, 181.

dicial review by refusing to comply with same thus requiring the employee to sue under 45 U.S.C.A. 153 (p), but, in addition, and because of the availability to the employee of the Section 153 (p) action, he may not take concerted action with his fellow employees to force the carrier to comply.[40] The importance to the employee of the Section 153 (p) proceeding is further enhanced by the rule that only the Board may order reinstatement. Thus, an employee whose employment is wrongfully terminated by the carrier may not seek reinstatement in a common law action. He must elect to treat the wrongful discharge as final and sue the carrier for damages in the form of future wage loss. In such a suit he may find himself barred by his failure to follow the grievance procedures provided for by the applicable agreement.[41]

Thus, except for the limited area wherein a wrongfully discharged railroad worker can elect to treat his employment as terminated and seek damages for future wage loss, he is totally dependent upon the Board for redress. And, if he secures a favorable award, because of the rule permitting the enjoining of concerted action to secure its enforcement, he is totally dependent upon the federal district court in the event the carrier chooses to disregard the Board's mandate.

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[40] *Locomotive Engineers v. Louisville & N. R. Co.* (1963) 373 U.S. 33, 10 L. Ed. 2d 172.

[41] *Pennsylvania R. Co. v. Day* (1959) 360 U.S. 548, 3 L. Ed. 2d 1422. See *Moore v. Illinois Central R. Co.* (1941) 312 U.S. 630, 85 L.Ed. 1089; *Slocum v. Delaware, L. & W. R. Co.* (1950) 339 U.S. 239, 94 L.Ed. 795; *Transcontinental Air, Inc. v. Koppal* (1953) 345 U.S. 653, 97 L.Ed. 1325.

We submit that these considerations should move federal district courts, in the tradition of *Kirby* and *Hodges* to regard Section 153 (p) actions as *sui generis* and to give to the award sought to be enforced no less credit than the prima facie value with which the statute endows it. We note here again, that, by the terms of the statutes, "the findings and order of . . . the Adjustment Board shall be prima facie evidence of the facts therein stated."[42] In the award here sought to be enforced there is a specific finding by the Board that it had jurisdiction (R 7) and that it had the power to adjudicate the dispute before it by resort to a three doctor panel to review the findings of the carrier's physicians. (R 7-8.) The presumptive validity of these findings, we submit, creates a factual issue on the question of the jurisdiction of the Board to make the award in question which precluded summary judgment.

III. THE DISTRICT COURT'S DENIAL OF RELIEF UNDER RULE 60(b) CONSTITUTED AN ABUSE OF DISCRETION.

We have set forth above the events which followed entry of summary judgment for the company. Appellant's counsel, at a conference with Mr. J. P. Colyar, General Chairman, BLE, in San Francisco was advised by Mr. Colyar that, as a result of negotiations with the officials of the Southern Pacific Company and

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[42] 45 U.S.C.A. 153(p), Note 2, *supra*.

its wholly owned subsidiary, SD&AE,[43] agreement had been reached to utilize a three doctor panel to resolve disputes as to whether an engineer employee was qualified physically for active service. Mr. Colyar provided counsel for appellant with copies of correspondence which confirmed his contention that the SD&AE-BLE agreement contained such a provision as early as October 2, 1947.

Mr. Colyar's views, and the confirmatory evidence to support same, were presented to the district court together with affidavits of appellant and his attorney in explanation of their failure to discover same prior to summary judgment.

Rule 60 (b), Federal Rules of Civil Procedure provides, in part, as follows:

> "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59 (b); * * * or (6) any other reason justifying relief from the operation of the judgment. * * *"

Appellant's motion, made approximately eight months after entry of the summary judgment and

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[43]In negotiating with the Southern Pacific Company and with its wholly owned subsidiary. SD&AE, Mr. Colyar talks to the same individual. Mr. Schomp, according to his affidavit filed July 23, 1962, is personnel manager for Southern Pacific and, also, SD&AE. (R 259.)

approximately three months after discovery by appellant of the evidence which he brought to the court's attention by means of said motion, was made upon grounds (1), (2) and (6) of the Rule.

The rules applicable to such motions, and review of denial of same, are set forth in the following quote from *Petition of Devlas* (S.D. N.Y. 1962) 31 F.R.D. 130.

> "The tenor of the cases decided under Rule 60 (b) makes it clear that this motion is equitable in nature and appeals to the conscience of the court. Serio v. Badger Mutual Insurance Co., 266 F. 2d 418, 421 (5th Cir. 1959), cert. denied 361 U.S. 832, 80 S. Ct. 81, 4 L. Ed. 2d 73 (1959): 'The rule is to be liberally construed in order that judgments may reflect the true merits of a case.' Consolidated Gas & Equipment Co. of America v. Carver, supra, 257 F. 2d at p. 104: '(T)he rule is to be liberally construed as a grant of power to a court to vacate a judgment when such action is appropriate to accomplish justice.' Huntington Cab. Co. v. American Fidelity & Casualty Co. 4 F.R.D. 496, 498 (S.D. W. Va. 1945); 'The courts have given this rule [60 (b)] a liberal construction, always trying, when possible, to see that cases are decided on their merits.' Pierre v. Bermuth, Lemke Co., 20 F.R.D. 116 (S.D.N.Y. 1956), in which Judge Bryan quotes with approval from 7 Moore, Federal Practice, p. 308 (2d ed. 1950): 'This provision is a grant reservoir of equitable power to do justice in a particular case.' See Fiske v. Buder, 125 F. 2d 841 (8th Cir. 1942); 3 Barron & Holtzoff, Federal Practice and Procedure, Rules Ed., 392, 1332."

In a double barreled rejection of appellant's motion, the district court "found *nothing* in the record to justify petitioner's failure to discover and present to the court prior to the rendition of judgment the evidence he now proffers" (R 314), and, in any event, held that "(R)ecourse to statements in affidavits filed by the defendant is not necessary for us to see that petitioner has not produced *and would not be able to produce at a trial,* any evidence which could lead to a determination in his favor." (R 314.)

It is true that the company was able to show that Mr. Colyar wrote to SD&AE about its intentions with respect to the Board's award in appellant's favor in 1958 and that on March 29, 1960 appellant authorized Mr. Colyar to assert against the carrier his claim to reinstatement and back pay pursuant to said award. But this circumstantial evidence is insufficient to rebut the sworn statements of appellant and his counsel denying knowledge of the correspondence establishing the provision for a three physician panel until the conference of February 28, 1962 and affirming their lack of access to the files containing such correspondence. The intracacies of inter-union rivalry and labor-management relations in the railroad industry afford numerous explanations as to how Mr. Colyar could be querying the carrier as to enforcement of the award and, subsequently, securing appellant's authorization to permit him to present same to the carrier, and still not communicate to appellant or his counsel the contractual documentation in support of the claim.

Instead of giving to appellant the benefit of doubt on this score, the court chose to infer that appellant either knew, or in the exercise of reasonable diligence could have known of the existence of the correspondence establishing the three-physician system. It did this despite the evidence that for many years prior to March 29, 1960, when appellant finally sought the assistance of the BLE in asserting his claim, Mr. Colyar was a BLE official representing engineer employees who adhered to the BLE and appellant was an official of a rival union, BLF&E, representing engineer employees who adhered to that organization. We respectfully suggest that this indicates that the district court did not exercise discretion in rejecting appellant's explanation but, instead, permitted its understandable reluctance to render idle the effort which had been expended in making its decision on summary judgment to stay the exercise of such discretion.

The second ground of the court's denial of appellant's Rule 60 (b) motion was that appellant had not produced and would not be able to produce at trial any evidence which could lead to a determination in his favor. The court's prediction that appellant would not be able to produce at trial any evidence which could lead to a determination in his favor should not be construed as an assertion of omnipotence on the part of the court; it emphasizes, instead, the somewhat dogged resistance of the court to the notion that there could be evidence of the applicable agreement other than the contents of the green booklet.

The Rule 60 (b) motion was directed at a summary judgment which, of course, should not have been granted unless the record left no doubt as to the absence of factual issues for trial. We submit that the newly discovered evidence should have been considered by the district court in terms of whether it created doubt as to the propriety of the summary judgment; not as to whether it changed the court's mind as to what the agreement of the parties was with respect to the right of the company to determine the physical qualifications of its employees for active service. The court's reliance upon the omission of any three physician panel provision from the revised booklet of January 1, 1956 evidences that, in passing upon appellant's Rule 60 (b) motion, the court was weighing the evidence, not determining whether the newly discovered evidence created doubt as to whether there were factual issues for trial. Obviously, the omission of the three physician panel provision from the 1958 booklet does not eliminate all possibility of the existence of such a provision as a term of the applicable agreement as of December 30, 1954. Upon trial appellant may be able to produce an explanation for the omission of the provision from the 1958 booklet. Appellant has been too busy fighting for survival against defendant's motions for summary judgment to proceed in the usual fashion to discover by deposition, and otherwise, all available evidence as to the terms of the applicable agreement as of December 30, 1954.

CONCLUSION

A combination of tenacious refusal by the carrier to observe the mandate of the National Railroad Adjustment Board and resistance by the court to the notion that there are sound reasons, including the necessity for full development, at trial, of the respective contractual rights and duties of the parties, why determination of appellant's case should not be made on motion for summary judgment, has effectively frustrated appellant's right to have his case heard on its merits. We respectfully submit that the grant of summary judgment in this case was error, just as we are now told by the Fifth Circuit that the grant of summary judgment in action 2080-SD-W was error. The district court also erred in refusing to exercise its discretion to correct matters by granting appellant's motion under Rule 60 (b).

For the reasons stated above, we respectfully request that the summary judgment be reversed and the cause remanded for trial on the merits.

Dated, January 24, 1964.

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Certificate of Counsel

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Charles W. Decker,
Attorney for Appellant.